RECORD AND BRIEFS

No. 01-618

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IN THE

Supreme Court of the United States

ERIC ELDRED, *et al.*,
Petitioners,

v.

JOHN D. ASHCROFT,
In his official capacity as Attorney General,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE* SYMPHONIC AND CONCERT COMPOSERS JACK BEESON, CHEN YI, JOHN CORIGLIANO, JOHN DUFFY, HAROLD FARBERMAN, PHILIP GLASS, ADOLPHUS HAILSTORK, JENNIFER HIGDON, LIBBY LARSEN, TANIA LEÓN, STEPHEN PAULUS, GEORGE ROCHBERG, NED ROREM, AUGUSTA READ THOMAS, MELINDA WAGNER AND RICHARD WERNICK IN SUPPORT OF RESPONDENT

I. FRED KOENIGSBERG *
GAELA K. GEHRING FLORES
WHITE & CASE LLP
1155 Avenue of the Americas
New York, NY 10036-2787
(212) 819-8200

* Counsel of Record

Attorneys for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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INTERESTS OF *AMICI CURIAE* [1]

Jack Beeson, Chen Yi, John Corigliano, John Duffy, Harold Farberman, Philip Glass, Adolphus Hailstork, Jennifer

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part. The only entity, other than the named *amici curiae* and their counsel, to make a monetary contribution to the preparation and submission of this brief is the American Society of Composers, Authors and Publishers (hereinafter "*ASCAP*").

Higdon, Libby Larsen, Tania León, Stephen Paulus, George Rochberg, Ned Rorem, Augusta Read Thomas, Melinda Wagner and Richard Wernick submit this brief as *amici curiae* in support of Respondent pursuant to Rule 37 of the Rules of the Court. All of the *amici* are distinguished composers of symphonic and concert (sometimes called "serious" or "classical") music, and include four Pulitzer Prize winners and Oscar, Golden Globe, Emmy and Grammy winners.

Jack Beeson is best known for his works, *Hello Out There*, a one act chamber opera produced by the Columbia Theater Associates in 1954, and *Lizzie Borden*, commissioned by the Ford Foundation for the New York City Opera and premiering in 1965. He is presently MacDowell Professor of Music Emeritus at Columbia University, where he taught for half a century.

Chen Yi was born in China. After a period of enforced labor during the Cultural Revolution (during which time classical music was forbidden), she became a concertmaster and composer with the Beijing Opera Troupe. She continued her studies in the United States, receiving her Doctor of Musical Arts degree from Columbia University in 1993. She has been appointed Composer-in-Residence for the Women's Philharmonic, Chanticleer and the Aptos Creative Arts Program in San Francisco, and has taught at the Peabody Conservatory and the UMKC Conservatory (as Cravens/Millsap/Missouri Distinguished Professor in Composition). In 2001, she received the Ives Living Award (2001-2004) from the American Academy of Arts and Letters. She also has received the Lili Boulanger Award and the CalArts Alperts Award for Music, fellowships from the Guggenheim Memorial Foundation, the American Academy of Arts and Letters, and grants from the National Endowment for the Arts, the Mary Flagler Cary Charitable Trust, the Fromm Music Foundation and the Koussevitzky Foundation.

John Corigliano won the Oscar in 2000 for best film score for *The Red Violin*, and the Pulitzer Prize for his *Symphony No. 2* in 2001. *Symphony No. 1*, Corigliano's personal response to the AIDS crisis, won music's Nobel Prize—the 1991 Grawemeyer Award for Best New Orchestral Composition.

John Duffy, among his numerous other awards, has won two Emmys, an ASCAP award for special recognition in film and television music, a New York State Governor's Art Award and the (New York City) Mayor's Award of Honor for Arts and Culture. He is founder of Meet the Composer, an organization dedicated to the creation, performance, and recording of music by American composers.

Harold Farberman's very first work, *Evolution*, written in 1954, has been recorded four times, once by Leopold Stokowski. In 1956 his *Quartet for Flute, Oboe, Viola and Cello* received first prize in the New England Composer's Competition. In 1957 *Greek Scene* was chosen to represent the United States in an International Composer's Symposium held in Paris. For his dedication to the music of Charles Ives through performance and recordings, Farberman was awarded the Ives Medal. He is the founder of the Conductors Guild and also created the Conductors Institute, the premiere training ground for young conductors from around the world.

Philip Glass has collaborated with a variety of artists in a range of media including opera (*Satyagraha, Akhnaten, The Making of the Representative for Planet 8, The Fall of the House of Usher, Hydrogen Jukebox and The Voyage*), film (*Koyaanisqatsi, Mishima, Powaqqatsi, A Brief History of Time, Candyman, The Thin Blue Line, Kundun, Dracula, The Truman Show*), dance (*A Descent into the Maelstrom, In the Upper Room*), theatre works (*The Photographer, 1000 Airplanes on the Roof, The Mysteries, What's so Funny?, Orphée, La Belle et La Bête, Les Enfants Terribles*), cooperative recording projects (*Songs from Liquid Days,*

Passages), orchestral works (*Itaipu, Symphony No. 2, Symphony No. 3, the "Low" and "Heroes" symphonies, Symphony No. 5—Requiem, Bardo and Nirmanakaya*). In 2000, he was awarded the George Peabody Medal for Outstanding Contributions to Music in America. His original music for the *Truman Show* won a Golden Globe award for Best Score in 1999.

Adolphus Hailstork's *Out of the Depths* won the 1997 Belwin-Mills Max Winkler Award presented by the Band Directors National Association; his *American Guernica* received first prize in the Virginia College Band Directors' 1983 national contest; and *Mourn Not the Dead* received the 1971 Ernest Bloch Award for choral composition. He is a Professor of Music and Eminent Scholar at Old Dominion University.

Michael Hersch has received the American Composers Prize (1997), the Guggenheim Fellowship (1997), the Prix de Rome (2000) and the Berlin Prize (2001). He also has received awards from the American Academy of Arts & Letters, the New York Youth Symphony's First Music prize, two Meet the Composer grants, three ASCAP Young Composer Awards and five ASCAP Foundation grants. He was selected as the Pittsburgh Symphony Orchestra's Composer of the Year for the 2002-2003 season.

Jennifer Higdon's work, *Shine* (commissioned by the ASCAP Foundation), was named Best Contemporary Piece of 1996 by *USA Today* in their year-end classical picks. She has received awards from the Guggenheim Foundation, the American Academy of Arts & Letters, the Pew Fellowship in the Arts, the International League of Women Composers, Composer, Inc., the University of Delaware New Music Competition, the Louisville Orchestra New Music Search, the Cincinnati Symphony's Young Composer's Competition, NACUSA, and ASCAP. She has received grants from the

National Endowment for the Arts, Meet-the-Composer, and the Pennsylvania Council on the Arts. She is currently on the composition faculty of the Curtis Institute of Music.

Libby Larsen has received numerous awards, including a 1994 Grammy as producer of the CD *The Art of Arleen Augér*, an acclaimed recording that features Larsen's *Sonnets from the Portuguese*. Her opera *Frankenstein, The Modern Prometheus* was selected as one of the eight best classical music events of 1990 by *USA Today*. She was the first woman to serve as a resident composer with a major orchestra, and has held residencies with the California Institute of the Arts, the Arnold Schoenberg Institute, the Philadelphia School of the Arts, the Cincinnati Conservatory, the Minnesota Orchestra, the Charlotte Symphony and the Colorado Symphony. In 1973, she co-founded (with Stephen Paulus) the Minnesota Composers Forum, now the American Composers Forum.

Tania León was born in Havana, Cuba and came to the United States in 1967. She became a founding member and the first musical director of the Dance Theatre of Harlem in 1969. Her orchestral work *Horizons* was written for the NDR Symphony Orchestra in Hamburg and was premiered there in July 1999. Her opera *Scourge of Hyacinths* was commissioned by the Munich Biennale in 1994, where it won the BMW Prize as best new work of opera theatre. She has received awards for her compositions from the American Academy of Arts and Letters, the National Endowment for the Arts, Chamber Music America, the Lila Wallace/Reader's Digest Fund, NYSCA, ASCAP, and Meet the Composer, among others. She is a Professor of Music at Brooklyn College.

Stephen Paulus' opera, *The Postman Always Rings Twice* was the first American opera to be performed at the Edinburgh Festival. He has written five other operas and has received Guggenheim and NEA Fellowships, as well as

commissions from the New York Philharmonic, Cleveland Orchestra, Juilliard Opera Center, The Festival Singers and many others. He is co-founder and a current Board Vice President of the American Composers Forum, the largest composer service organization in the world.

George Rochberg's 1971 *Third String Quartet* was critically acclaimed by the *San Francisco Examiner* as "the work that defines the attitudes of a generation of composers." He is the recipient of numerous awards, grants and fellowships, including the Alfred I. du Pont Award for Outstanding Conductors and Composer (Delaware Symphony), Elected Fellow of the American Academy of Arts and Sciences, the Gold Medal Brandeis Creative Arts Award, the American Academy of Arts and Letters, First Prize Kennedy Center Friedheim Award, two Guggenheim Fellowships, the George Gershwin Memorial Award, and the Fulbright Fellowship. He taught at Curtis Institute of Music from 1948 to 1954. In 1960, he joined the faculty of the University of Pennsylvania, where he served as chairman of the Department of Music until 1968. He retired from teaching in 1983 as Emeritus Annenberg Professor of the Humanities.

Ned Rorem's suite *Air Music* won the 1976 Pulitzer Prize in music. The Atlanta Symphony recording of the *String Symphony, Sunday Morning*, and *Eagles* received a Grammy Award for Outstanding Orchestral Recording in 1989. He has been the recipient of a Fulbright Fellowship (1951), a Guggenheim Fellowship (1957), and an award from the National Institute of Arts and Letters (1968).

Augusta Read Thomas has received numerous prizes and awards from, among others, ASCAP, BMI, the National Endowment for the Arts, the American Academy and Institute of Arts and Letters, the John Simon Guggenheim Memorial Foundation, the Koussevitzky Foundation, the New York Foundation for the Arts, the John W. Hechinger

Foundation, the Kate Neal Kinley Foundation, The Debussy Trio Music Foundation and Thomas van Straaten, Columbia University (Bearns Prize), the Naumburg Foundation, the Fromm Foundation, the Barlow Endowment, Harriett Eckstein, the New York State Council for the Arts, and Chamber Music America. She was the recipient of the Third Century Award from the Foundation for a Creative America. She received fellowships from the Bunting Institute of Radcliffe College, the Rockefeller Foundation (Bellagio), the International Rotary Foundation, L'Ecole Normal in Fountainbleau, France, Tanglewood Music Center, the Gaudeamus Foundation, the Wellesley Composers Conference, and the Atlantic Center for the Arts and the Aspen Music Festival. She is currently a Professor on the composition faculty at Northwestern University and the Composer-in-Residence of the Chicago Symphony Orchestra.

Melinda Wagner was awarded the Pulitzer Prize in music in 1999 for her *Concerto for Flute, Strings, and Percussion*, and her works have been performed by the Chicago Symphony Orchestra, American Composers Orchestra, the Chamber Music Society of Lincoln Center, the New York New Music Ensemble, and the Society for New Music. She is the recipient of numerous honors including fellowships from the Guggenheim Memorial Foundation and the Howard Foundation (Brown University), grants from the Illinois Arts Council and the New York State Council on the Arts, three ASCAP Young Composer Awards, and resident commissions from the Barlow Foundation, the Mary Flagler Cary Charitable Trust, the Fromm Foundation (Harvard University), and the Ernst and Young Emerging Composers Fund.

Richard Wernick is Professor Emeritus of the University of Pennsylvania. He received the 1977 Pulitzer Prize in music. From 1983 to 1989, he served as the Philadelphia Orchestra's Consultant for Contemporary Music, and from 1989 to 1993 served as Special Consultant to Music Director,

Riccardo Muti. He is the only two-time first prize Friedheim Award recipient, and has been honored by awards from the Ford Foundation, Guggenheim Foundation, National Institute of Arts and Letters, and the National Endowment for the Arts.

SUMMARY OF ARGUMENT

The experience of centuries of musical history testifies to one of the most unhappy realities of symphonic and concert music: a delay of acceptance and recognition, not to say remuneration, typically for decades. Our modern musical era has been no exception; most composers of symphonic and concert music today live in relative obscurity and economic need while creating their life's work, and only close to death or after death do they or their heirs start to reap acknowledgment and compensation for their works.

By extending copyright protection for new and existing works, the Sonny Bono Copyright Term Extension Act of 1998 ("*CTEA*"), Pub. L. No. 105-298, 112 Stat. 2827, provides composers of symphonic and concert music the increased assurance that, even accounting for longer lifespans and having children later in life, the musical legacy they leave behind will at least provide sustenance for their spouses, their children and their grandchildren.

The CTEA's extension of copyright protection for *existing* works also acts to promote the creation of *new* works of symphonic and concert music by emerging composers, because these creators rely on awards, grants, scholarships and fellowships for financial support. Countless such awards are funded by royalties collected for older, established works of symphonic and concert music. The CTEA ensures that such funding will continue for a reasonable time.

The CTEA further enriches the American musical heritage by affording the heirs of symphonic and concert composers and those who in invest in their works critical additional time

to promote and disseminate the composers' life work to the public—a promotion and dissemination which otherwise might not occur.

All of these facts were presented to Congress as it considered the CTEA. Congress measured the testimony and statements of numerous individuals and entities that emphasized the need to compensate creators of serious works of art (including works of symphonic and concert music), encourage the investment in and further dissemination of existing works, and promote the creation of new works. These facts, and the many others Congress considered, leave no doubt that the CTEA's extension of copyright protection to existing works does indeed "Promote the Progress of Science and useful Arts." *See* U.S. Const. art. I, § 8, cl. 8 ("The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.").

ARGUMENT

I. RECOGNITION OF, AND REMUNERATION FOR, THE LIFE WORK AND LEGACY OF CREATORS OF SYMPHONIC AND CONCERT MUSIC IS USUALLY LONG-DELAYED

Professionals in the creative arts consistently struggle with the very real possibility that their life's work may never be recognized during their lifetimes. Artistic creators run this risk nonetheless, often sacrificing economic enrichment for themselves in hopes that their creations may someday provide for their heirs. This is particularly true for composers of symphonic and concert music. Centuries of history stand witness to their particular plight. Countless composers from the past, today considered the Great Masters of classical music, died in relative obscurity (and often times, poverty), and were not fully recognized in the repertoire until long after their deaths.

History is replete with examples of symphonic and concert usical works that were originally greeted with scathing iticism, yet later accepted as masterpieces. Consider the llowing concerning the derision which first greeted Stransky's *Rite of Spring*, and the forty years it took to cognize this masterpiece:

> A fairly accurate time-table could be drawn for the assimilation of unfamiliar music by the public and the critics. It takes approximately twenty years to make an artistic curiosity out of a modernistic monstrosity; and another twenty to elevate it to a masterpiece. . . . With what precision the law of a forty-year lag in the integral acceptance of a modern masterpiece operates, was demonstrated by the wild cheers that greeted Stravinsky at the performance of *Le Sacre du Printemps* in Paris on May 8, 1952, thirty-nine years after its première. Pierre Monteux, who conducted both performances, in 1913 and in 1952, remarked: "There was just as much noise the last time, but of a different tonality."

ICOLAS SLONIMSKY, LEXICON OF MUSICAL INVECTIVE: RITICAL ASSAULTS ON COMPOSERS SINCE BEETHOVEN'S ME 19 & n. (2d ed. 1978).

The American public is equally slow to recognize its major ntributors to the repertoire of symphonic and concert usic. An example is the life work of Charles Edward Ives 874-1954), now considered one of America's greatest asters of symphonic and concert music, whose works were t taken seriously until a decade after his death:

> [Charles Ives'] [e]arly works include the precocious *Variations on "America"* for organ, written at seventeen; it would find considerable popularity after Ives died. . . . His epic *First Piano Sonata*, begun in 1901, was the first large-scale work in his radical vein, and cost him at least eight years of effort. It would not find its premiere until 1949. . . . [D]uring his years of obscurity Ives constantly showed his work to musicians,

> hired groups to play over pieces, revised the music based on what he heard, and had much of his music expertly copied. Yet, for twenty years the nearly unanimous reaction of musicians to his music was somewhere between laughter and outrage. It is no wonder that he required, as Aaron Copland put it, "the courage of a lion." . . . Charles Ives died in May 1954. . . . It was not until a decade later that the musical mainstream really began to take Ives seriously.

Jan Swafford, "Charles Ives: A Life With Music" (1998), *available at* http://www.charlesives.org/02bio.htm.

The delay in recognition of symphonic and concert composers' works continues to this day. That delay means not only a delay in compensation for the composer and his or her heirs, but also a delay in return to the music publisher who invests in such works and supports the composer for those long years. Edward P. Murphy of the National Music Publishers' Association echoed the observations of Pierre Monteux in his 1995 testimony before Congress, advocating passage of the CTEA:

> [M]uch serious music gains little public exposure or acceptance until many years after its creation. For example, the famous Barber composition, "Adagio for Strings," experienced only modest economic success following its debut in 1939. It became popular 25-years later, however, when the piece was used in connection with the funeral of President Kennedy. Another Barber work, an opera, "Anthony and Cleopatra," premiered in 1966, but was not performed or recorded again until 1991. This cycle of earnings which is typical of serious and classical works means that a composition, which may some day be recognized as an American classic may not return a profit to the creator's descendants or to the music publisher owner within the current term of copyright protection. . . .

Copyright Term, Film Labeling, and Film Preservation Legislation: Hearings on H.R. 989, H.R. 1248 and H.R. 1734

Before the House Subcomm. on Courts and Intellectual Prop. of the House Comm. on the Judiciary, 104th Cong. (hereinafter "*1995 House Hearing*") 76-77 (1995).

A more recent example of this phenomenon is now world-renowned composer (and *amicus* on this brief) Philip Glass, whose work in the late 1970s and 1980s was greeted with "frantic bravos and violent boos, sometimes coming from the same people. Not since the days of the young Stravinsky had a music appeared that so engaged the emotions of the people who heard it. While many were hailing Glass as the man who had revitalized music and made opera a viable art form again, just as many were castigating him for 'destroying' music." Robert T. Jones, *Introduction*, *at* http://www.philipglass.com/.

George David Weiss, composer of "What a Wonderful World" and "The Lion Sleeps Tonight," testified before Congress regarding fair compensation to the artistic creators who enrich our culture. He noted that many composers—and not merely those who write "serious" music—do not achieve public recognition or financial reward until after their death:

> There are innumerable composers whose works never reach the pinnacle of public recognition until after their death. Herman Hupfeld ("As Time Goes By"), Vincent Youmans, and Charles Ives are just three examples. Whether it is because their music is *avant garde*—or out of synch with what is currently popular—such artists toil in obscurity for most of their creative days. And suddenly, after their death, public recognition and financial rewards abound. Too late for the creator, but in time to nourish their heirs - if the duration of protection is sufficient. What was lost to the creator should not be also lost to his or her heirs. . . . If we are to encourage creativity, at a minimum we must offer to the thousands of my colleagues who struggle to earn a living in this difficult and competitive business the reasonable prospect that they can leave a legacy to their children and grandchildren—even if their compositions do not become commercially viable for many years.

The Copyright Term Extension Act of 1995: Hearings on S. 483 Before the Senate Comm. on the Judiciary, 104th Cong. (hereinafter "*1995 Senate Hearing*") 142-43 (1995).

II. THE CTEA RATIONALLY PROMOTES THE PROGRESS OF SCIENCE AND USEFUL ARTS BY ALLOWING FOR FAIR COMPENSATION AND ENCOURAGING CREATIVITY, INVESTMENT, PRESERVATION, PROMOTION AND DISSEMINATION IN FIELDS IN WHICH AN ARTIST'S WORK IS RECOGNIZED VERY LATE IN LIFE OR POSTHUMOUSLY

A. The CTEA Provides Fair Compensation for the Enrichment of American Culture through Symphonic and Concert Musical Works

Once accepted into the repertoire, works of symphonic and concert music enrich our culture and the lives of those who enjoy the music—the very essence of the constitutional goal of "promotion of progress" in our culture. Those who create such enrichment for the public good should be justly compensated with the assurance of an adequate copyright term.[2] For most symphonic and concert music composers, a

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[2] *See* S. REP. NO. 104-315, at 3 (1996) ("[The CTEA] will ensur[e] fair compensation for American creators, who deserve to benefit fairly from the exploitation of their works."); *id.* 11-12 ("[I]ntellectual Property is the only form of property whose ownership rights are limited to a period of years, after which the entire bundle of rights is given as a legacy to the public at large. In balancing these competing interests, Congress has sought to ensure that creators are afforded ample opportunity to exploit their works throughout the course of the works' marketable lives, thus maximizing the return on creative investment and strengthening incentives to creativity.").

copyright term sufficient in length *following* their death is the only means, albeit posthumous, of fair compensation for their life's work.

To provide creators of artistic works fair compensation for their contributions to American culture, the copyright term has historically been intended to cover the life of the author plus two generations. *See* H.R. REP. NO. 105-452, at 4 (1998). Due to increases in life expectancy and a delay in procreation until later in life, however, the copyright term provided by the 1976 Copyright Act fell short of this goal—approximately 20 years short. This was the inequity Congress was asked to, and did, remedy through the CTEA:

> Now certainly, there has been a minor increase in life expectancy in the United States since the duration provisions of the 1976 Act were proposed in the early 1960s, and enacted in 1976. . . . But the relation of life expectancy to copyright term should not be made by comparing the life-plus-50-years term and life expectancy in 1976 or 1964 with a life-plus-70-years term and life expectancy in 1990 or 1995. Rather, we must realize that life-plus-50-years was the international norm at the beginning of this century. Thus the increase in life expectancy over the 20th Century (from about 52 years in 1909-1911 to about 76 years now) should be reflected in an increase from the international life-plus-50-years norm at the beginning of the century to a life-plus-70-years term now. . . . [T]he life-plus term is also designed to protect the next two generations of the author's heirs. Extended copyright term is necessary to achieve adequate protection for the author's heirs, during the additional years they, too, are expected to live.

1995 Senate Hearing 134 (Joint Statement of the Coalition of Creators and Copyright Owners). Congress specifically recognized this fact when it enacted the CTEA. *See* S. REP. NO. 104-315 at 11 (1996) ("The Register of Copyrights informed the Committee that even for . . . works [that] are

afforded the basic life-plus-50 term of protection, the current term has proven insufficient in many cases to protect a single generation of heirs.") (citing Testimony of Marybeth Peters, Register of Copyrights and Associate Librarian of Congress for Copyright Services, *1995 Senate Hearing* 22).

Thus, the CTEA merely updated the copyright term to account for current life expectancy and child bearing patterns, ensuring that fair compensation for both existing and new works, especially to the heirs of composers of symphonic and concert music, would not fall short of two generations. *See 1995 Senate Hearing* 2 (Opening Statement Sen. Hatch) ("When we so often see copyrights expiring before even the first generation of an author's heirs have fully benefited from them, then I believe it is accurate to say that our term of copyright is too short.").

B. The CTEA Promotes American Culture by Extending Copyright for Existing Symphonic and Concert Music

Congress specifically recognized that the CTEA promoted progress in culture in two ways: First, by providing an incentive for the creation of new works; and second, by extending protection for existing works which then supports further creativity, investment and dissemination.

> [T]he basic functions of copyright protection are best served by the accrual of the benefits of increased commercial life to the creator for two reasons. First, the promise of additional income will increase existing incentives to create new and derivative works. *The fact that the promise of additional income is not realized for many years down the road does not diminish this increased creative incentive. One of the reasons why people exert themselves to earn money or acquire property is to leave a legacy to their children and*

grandchildren. . . . Second, extended protection for existing works will provide added income with which to subsidize the creation of new works.

S. REP. NO. 104-315 at 12 (1996) (emphasis added).

1. *The CTEA Ensures a Proper Legacy to the Composer's Heirs*

Beyond fair and just compensation for themselves (which too often is illusory), the expectation that the copyright term will provide a potential legacy for their children and grandchildren gives symphonic and concert composers a significant incentive to create. The CTEA's extension of copyright term for existing works further bolsters this incentive, assuring symphonic and concert composers that the creative legacy they leave may someday benefit their heirs. E. Randol Schoenberg (grandson of Austrian-American composer Arnold Schoenberg[3]) testified from personal experience about the importance of a fair post-mortem copyright term to serious music composers:

> My grandfather, the world-renowned Austrian-American composer, Arnold Schoenberg, came to this country in 1933 after being forced by the Nazis to abandon his

[3] Arnold Schoenberg is one of the composers, now recognized as a master of the classical music genre, who was subject to vituperative criticism when his works debuted. One of many critics said at the time of a now highly-regarded work:

> I must reject completely the five orchestral pieces of 1909. . . . These sounds conjure up hideous visions; monstrous apparitions threaten—there is nothing of joy and light, nothing that makes life worth living! How miserable would our descendants be, if this joyless gloomy Schoenberg would ever become the mode of expression of their time! Is this destined to be the art of the future????

NICOLAS SLONIMSKY, LEXICON OF MUSICAL INVECTIVE: CRITICAL ASSAULTS ON COMPOSERS SINCE BEETHOVEN'S TIME 150 (2d ed. 1978) (quoting Hugo Leichtentritt, *Signale*, Berlin, Feb. 7, 1912).

> position as the leading composition teacher at the Academy of Arts in Berlin, Germany. . . . He is generally considered to be the most important and influential composer of the twentieth century, and is called by some the "father of modern music.". . . Despite his importance in the field of music, my grandfather died in 1951 with few assets aside from his artistic works. He left behind my grandmother and three young children (ages 10, 14 and 19) who survived primarily on copyright royalties. . . . For my grandfather, as with most serious composers today, the prospect of performances and recognition after his death was his only hope of compensation and support for his young family. Had he not had faith in the ability of his copyrights to support his family, he would not have been able to devote the time that his groundbreaking work required. Certainly, [the CTEA] will be a further inspiration to those artists creating today, whose works are also not likely to receive their due during their lifetime.

1995 *House Hearing* 265 (Statement of E. Randol Schoenberg).

2. *Royalties from Existing Works Support Emerging Composers and Their New Works*

Not all royalties from existing works stay within the composer's family.[4] Many composers donate or bequeath the royalties from their works to benefit others in their field, especially those just starting out. Consequently, the extension of the copyright term for existing works promotes the creation of new symphonic and concert musical works by providing composers breaking into the field with the financial support needed to persevere in a discipline known for its

[4] A notable example of an accomplished composer whose royalties benefit others is Irving Berlin, who donated the royalties from *God Bless America* to a charitable trust, which conveys them to the Girl and Boy Scouts of America. *See American Treasures of the Library of Congress, God Bless America, at* http://www.loc.gov/exhibits/treasures/trm019.html.

unforgiving remunerative nature. Without aid from outside sources, many who would otherwise devote themselves to composing new works would turn away from their creative work so as to provide for themselves and their families, contravening the economic purpose of the Copyright Clause:

> If [Charles Ives] had continued on the career path of an organist/choirmaster/composer/teacher like Horatio Parker, Ives would have gone from Yale to complete his studies in a European, probably German, conservatory. Instead, he took a path that led him into one of the most difficult and unconventional lifestyles of any major composer: acting on some of his father's last words of advice, Ives decided to forego a musical career and go into business. When he left Yale in 1898, he headed for New York to begin as a $15-a-week clerk with the Mutual Lif Insurance Company. . . . As Ives put it, if a composer "has a nice wife and some nice children, how can he let them starve on his dissonances?"

Jan Swafford, "Charles Ives: A Life With Music" (1998), *available at* http://www.charlesives.org/02bio.htm.

This all-too-familiar economic and professional dilemma has led to the creation of foundations, awards, grants and fellowships—all funded, in full or in part, by the royalties from existing works—which support emerging composers of symphonic and concert music. The ASCAP Foundation, for example, reinvests donated royalties from existing works and other charitable contributions to fund awards, grants, scholarships and fellowships to emerging composers of symphonic and concert music. Among the ASCAP Foundation's awards, grants, fellowships and composer-in-residence programs providing resources for emerging composers are: The Morton Gould Young Composers Award, The Leo Kaplan Award, The New Horizons Award, The Sammy Cahn Award, The Rudolf Nissim Prize, The Young Jazz Composer Awards, The R&B Music Initiative, The Leonard Bernstein Composers Fund, The Leonard Bernstein Composer Fellowship at

Tanglewood, The Fellowship for Film Scoring & Composition at Aspen, The New York University Film Studies Fellowship in Florence, Italy, The ASCAP Foundation Commissioning Program, The Berklee College of Music Composer-in-Residence, The New York Philharmonic Education Program, The Metropolitan Opera Composer-in-Residence and The New York City Opera Composer-in-Residence. The ASCAP Foundation also awards numerous scholarships and grants to support musical composition students and musical education in various schools and summer camps and in fellowships and composer-in-residence programs. The ASCAP Foundation provides hundreds of thousands of dollars annually to emerging musical artists. *See ASCAP Concert Music: Programs Administered by ASCAP's Concert Music Department, at* http://www.ascap.com/concert/programs.html.[5] None of these programs would have been possible without the donation of royalties earned by existing works.

There are also many examples of individual composers who have bequeathed their royalties from existing works to support emerging artists. Aaron Copland, for instance, left virtually all of his estate to The Aaron Copland Fund for Music, Inc., which operates grant programs to encourage and improve public knowledge of contemporary American concert music and jazz. Since 1992, the Copland Fund has awarded more than $9 million to encourage and improve support for the recording, performance and other dissem-

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[5] The ASCAP Foundation is not alone in its assistance to musical composers. Other foundations reinvest royalties from existing works to aid emerging musical artists. For instance, the Kurt Weill Foundation for Music is funded entirely by royalties earned from the musical works of Kurt Weill and related literary and other rights, and uses such royalties to fund numerous activities that provide creative opportunities for new artists, including grants and awards such as the "Award for New Musical Theater" to encourage composers of new musical theater works. *See Kurt Weill Foundation for Music, at* www.kwf.org.

ination of American music, both in the United States and around the world. *See The American Music Center, AMC Grant Programs, The Aaron Copland Fund for Music Performing Ensembles Program Guidelines, at* http://www.amc.net/resources/grants/performing.html. Virgil Thomson also left the entire proceeds of his estate to the Virgil Thomson Foundation to provide assistance to concert music projects, particularly those involving contemporary American concert music. Charles Kingsford, Frank Proto and Irwin Bazelon left their estates to the ASCAP Foundation for the purpose of encouraging and assisting the efforts of emerging composers. *See The ASCAP Foundation: Where Music Grows, The ASCAP Foundation Timeline, at* http://www.ascapfoundation.org/timeline2.html (Charles Kingsford as major supporter). Dizzy Gillespie left his estate to a fund that reimburses the medical expenses of indigent jazz musicians. *See Englewood Hospital and Medical Center, at* http://www.englewoodhospital.com/Pages/dizzyGCI.html.

3. *Royalties from Existing Works Encourage Composers' Heirs and Others to Invest in, Promote and Disseminate Their Works*

Modern digital recording technology has made possible the permanent preservation of the American musical legacy. That, in turn, allows for increased investment in the dissemination of that legacy. In the case of symphonic and concert music, the heirs of composers, and their music publishers, most often take on the responsibility of preserving, promoting and disseminating the musical repertoire that was left behind. The CTEA provides these heirs (and investors) with the crucial incentive of an additional 20 years to take advantage of the gifts of the digital revolution in investing in and promoting their parents' or grandparents' creations. E. Randol Schoenberg testified:

> Today, our family continues to spend a great deal of time and energy promoting my grandfather's works and protecting his cultural legacy which is a treasured asset of the City of Los Angeles. My generation, the grandchildren, span from age 17 to 35. It would be a great loss if our family were not now able to reap the benefits of my grandfather's life's work, just as those benefits are coming to fruition. In serious music, even 70 years after death is sometimes insufficient. J.S. Bach's music had to wait almost 100 years after the composer's death before Felix Mendelsson "discovered" it and proclaimed its greatness to the world.

1995 Senate Hearing 65 (Statement of E. Randol Schoenberg).[6] The CTEA provides composers' heirs and others with an additional 20 years to invest in and promote works of American culture.

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[6] *See also 1995 Senate Hearing* at 58 (Statement of Mrs. Henry Mancini) ("My husband always intended that his work would be a legacy for his children. Indeed our children are actively involved in the business aspects of my husband's catalogue and insuring that his works continue to be available to the public."); *id.* at 60 (Statement of Ellen Donaldson, daughter of Walter Donaldson) ("My point is: [My father's works are] [s]till used, still there. After all these years. Not lost somewhere in 'cyberspace'. It is a small piece of the jigsaw puzzle of distinctly American intellectual property that helps define our national culture. It has been protected and promoted and always available. It has been a benefit to my mother, my sister and to me, as my father's direct heirs. . . ."); *id.* at 63 (Statement of Marsha Durham, daughter of African/Indian American composer, Eddie Durham) ("[A]fter many years of arduous research I am finally in the process of recapturing the rights to [my father's] songs for the final 19 years of copyright protection available under the 1976 Copyright Act. I am hopeful that through careful management of my father's catalogue, my brothers, sister and I will be able to recoup our legal expenses and to derive some revenues from our father's songs. The irony is, of course that absent an extension of the term of copyright, we will have only a few short years of income from the songs which should rightfully have been a source of income for my father, his children and his grandchildren for many years.").

As Congress considered the CTEA, it understood that one of the rationales behind the creation of the life-plus-50 term in the 1976 Act was that the technology at that time had increased the value of copyrighted works, especially serious works of art:

> Indeed early in the discussions of the first Copyright Office report on revision, term extension was advocated because new media made older works more exploitable. . . . It was repeatedly noted that the value of serious works was often not fully recognized until well into the copyright term . . . . 122 Cong. Rec. 3834 (1976) (statement of Sen. Hugh Scott; "[a] short term is particularly discriminatory against serious works of music, literature, and art, whose value may not be recognized until after many years," referring to works of F. Scott Fitzgerald, Theodore Dreiser and Sinclair Lewis).

1995 Senate Hearing 135 (Joint Statement of the Coalition of Creators and Copyright Owners). The digital and Internet revolutions provide the same, if not more imperative, grounds for the CTEA's 20-year extension to protect existing works.

CONCLUSION

Half a century ago, this Court recognized—as did Madison in *The Federalist Papers*—that proper economic remuneration to creators was not only fully consonant with, but also essential to, the public good:

> The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts." Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.

Mazer v. Stein, 347 U.S. 201, 219 (1954).[7] More so than in any other artistic endeavor, the creation of symphonic and concert music requires "sacrificial days." It is only right and just—to say nothing of reasonable—that Congress recognized that copyright term extension for new and existing works was necessary to compensate the composer and two generations of heirs, and to provide for investment in, and preservation, promotion and dissemination of, existing works. For these rational reasons, and a host of others, Congress enacted the CTEA, and so provided the necessary protection and incentives for the promotion of progress of serious American works of art, among them, works of symphonic and concert music.

The decision below should be affirmed.

Respectfully submitted,

I. FRED KOENIGSBERG *
GAELA K. GEHRING FLORES
WHITE & CASE LLP
1155 Avenue of the Americas
New York, NY 10036-2787
(212) 819-8200

* Counsel of Record

Attorneys for Amici Curiae

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[7] "The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged, in Great Britain, to be a right of common law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals." THE FEDERALIST No. 43 (James Madison).